action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken. A jury will be told that the defence of self-defence, where the evidence makes its raising possible, will only fail if the prosecution show beyond doubt that what the accused did was not by way of self-defence. But their Lordships consider, in agreement with the approach in the *De-Freitas* case [1960] 2 W.I.R. 523, that if the prosecution have shown that what was done was not done in self-defence then that issue is eliminated from the case."

That was a decision of the Privy Council which the Court of Appeal in England has unhesitatingly accepted in *Reg.* v. *McInnes*.(2)

In the instant case the use of force was manifestly unnecessary: The appellant had only to say he was a police officer to nip even the verbal argument in the bud. In the use of force, the appellant would have a decided advantage over the deceased. As he admitted "I am much bigger in size than him". He naturally denied using any weapon because he must have realised that its use was excessive and cruel. In our view the appellant had made a dastardly attack on a man physically very much his inferior, using a vicious weapon when no resort to force was necessary. The deceased after remonstrating to the appellant over the throwing of glasses had apologised and returned to his own table. There the matter should have ended but for the appellant's own conduct in going over to the deceased's table and there creating occasion for the infliction of the fatal injury. The plea of private defence therefore fails and the appeal must be dismissed. With regard to sentence, in the light of the observations we have just made, we do not consider the term of three years in any way excessive and we accordingly affirm it.

Appeal dismissed.

Solicitors: *Joseph & Son.*

KIM CHOI v. IBRAHIM: LIANG TET, 3RD PARTY LIANG TET v. IBRAHIM & ANOR.

[O.C.J. (Suffian F.J.) March 20, 1972]

[Kuala Lumpur — Raub Civil Suit No. 26 of 1968 and Raub Civil Suit No. 37 of 1968]

Damages — Fatal accident — Contributory negligence — Quantum — Interest.

Road Traffic — Fatal accident — Damages.

Damages — Leg — 1¼" shortening — Fracture of clavicle — Pain and suffering.

These consolidated suits concerned claims for damages for injuries sustained by the respective parties in a road accident between a lorry and a scooter. The scooter rider died and his pillion rider the plaintiff in suit No. 26 was injured.

In suit No. 26, the plaintiff Kim Choi sued the defendant, Ibrahim, the lorry driver, and in suit No. 37, the plaintiff Liang Tet, the father and administrator of the estate of the deceased scooter rider, sued both Ibrahim and his employer. He was also cited as third party in the first suit.

The questions for decision in these suits were, first, who was to blame for the accident; secondly, if Ibrahim was to blame, was he wholly or partly to blame; and thirdly, the quantum of damages payable.

Held: (1) the defendant lorry driver was 2/3 to blame, and the deceased 1/3 to blame for the accident;

(2) the plaintiff in suit No. 26 was to be awarded general damages of $12,500 and agreed special damages of $300. The defendant in the same suit was to pay the plaintiff the said sums in full, with interest at the rate of 6% on general damages from the date of issue of the writ until judgment, and 3% interest on special damages from the date of the accident until judgment, and costs. The defendant was entitled to a contribution by the third party to the extent of 1/3;

(3) the plaintiff in suit No. 37 was to be awarded general damages of $3,500 and agreed special damages of $1,000. However, as the deceased was 1/3 to blame for the accident, the defendants were to pay the plaintiff 2/3 of each of the above figures with interest on the first sum at 6% from the date of issue of writ until judgment, and on the second sum at 3% from the date of the accident until the date of judgment.

Cases referred to:-

(1) *Lang* v. *London Transport Executive* [1959] 3 All E.R. 609.

(2) *Fruitnight* v. *George Wallis Ltd.* (*Bingham's* All the Cases on Negligence, 1st Edn. p. 210; 2nd Edn. p. 193).

(3) *Shenley* v. *G.L. Newman Ltd.* (*Bingham's* All the Modern Cases on Negligence, 1st Edn. p. 211; 2nd Edn. p. 194).

The following cases were also cited in argument: *Mohamed Repin* v. *Lim Yu Kee* [1969] 1 M.L.J. 64; *Ong Sim Moy & Ors.* v. *Ong Sim Hoe* [1969] 1 M.L.J. 82; *Tan Teck Suan* v. *Peter John Giles* [1968] 2 M.L.J. xxii; *Lee Kwang Meng & Anor.* v. *Lee King Soong* [1970] 1 M.L.J. xv; *See Toh Kin* v. *Chin Yin Fui* [1964] M.L.J. lix; *Teo Kim Ngo* v. *Chua Kim Liang & Anor.* [1964] M.L.J. lix; *Cheong Yuen Khiong & Anor.* v. *Lye Joo Seng* [1966] 2 M.L.J. xx; *C. Chinnappan* v. *Pansy Yau* [1966] 1 M.L.J. xxxiv; *Yew Chek Hwa* v. *Mathews* [1970] 1 M.L.J. xvi; *Ong Siew Yan & Ors.* v. *Donwilson Weeresekra* [1967] 2 M.L.J. xxviii; *Foo Meun Sin & Anor.* v. *Joseph Navaratnam* [1967] 2 M.L.J. xxviii; *Raja Piah binte Dig Meliwa & Children* v. *Chua Joo Tee* [1967] 2 M.L.J. xxix; *Aminah binte Abdullah & Ors.* v. *Lim Kim Kher* [1967] 2 M.L.J. xxix; *Ban Pet Hock* v. *Ong Ah Ho* [1966] 2 M.L.J. 253; *Yee Boon Heng* v. *Tan Chwee* [1967] 2 M.L.J. 157; *Foong Nan* v. *Sagadevan* [1971] 2 M.L.J. 24; *Cheong Yuen Khiong & Anor.* v. *Lye Joo Seng* [1966] 2 M.L.J. xx.

SUIT.

David Tay for the plaintiff in Suit No. 26 of 1968.

M. A. Marjoribanks for the defendants in both suits.

L. T. Onn for the third party and the plaintiff in Suit No. 37 of 1968.

Suffian F.J.: In these consolidated suits the agreed facts are as follows. On 25th June, 1967, at about 3.15 p.m. Kim Choi the plaintiff in Suit No. 26, whom I shall refer to as the first plaintiff, was travelling pillion on scooter PC91 ridden by one Liang Chin Sam. The scooter was travelling from the direction of Karak towards Mentakab town. Just outside Mentakab town near the railway crossing it collided with motor lorry BL 6847 which was being driven in the opposite direction by Ibrahim, the defendant in Suit No. 26 and the first defendant in Suit No. 37, whom I shall refer to as the first defendant, employed by Yap Beng Kong, the second defendant in Suit No. 37, and whom I shall refer to as the second defendant. As a result of the accident the scooter rider died and his pillion rider, the first plaintiff, was injured. I shall refer to the scooter rider as the deceased.

In Suit No. 26 the first plaintiff sues the first defendant Ibrahim the lorry driver and in Suit No. 37

Liang Tet, the father and administrator of the estate of the deceased scooter rider, sues both Ibrahim and his employer Yap. Liang Tet as administrator is also cited as a third party in the first suit. For convenience I shall refer to him as the second plaintiff.

The questions in these suits are, first, who was to blame for the accident; secondly, if Ibrahim was to blame, was he wholly to blame or only in part; and thirdly, if Ibrahim was to blame either wholly or in part, what is the quantum of damages payable?

Only one eye-witness of the accident was called, namely, the first plaintiff (the defence called no evidence at all), and if the first plaintiff is to be believed, then Ibrahim was wholly to blame. Mr. Marjoribanks, counsel for the defence, relying on the evidence elicited in cross-examination and on the plan of the scene prepared by the police soon after the accident, submits that the deceased was to blame either wholly or in part.

Having considered the evidence and submissions in these suits, I find the following facts proved.

Immediately before the accident the deceased had just crossed the level crossing. He was on the main road, proceeding towards Mentakab town. A short distance ahead of him was a turning to the left leading to the Mentakab railway station, which I shall call the station road. When the first plaintiff first saw the lorry, it was then on the station road. Both roads were dry and visibility was good and the first plaintiff saw some distance down the station road and I find that the deceased also could have seen some distance down that road if he had been keeping a proper look out. The lorry entered the main road and soon afterwards there was a collision between the two vehicles.

The first plaintiff swears that the collision occurred at the mouth of the junction between the main road and the station road at a spot which he marked with an *X* in the police plan. If the first plaintiff is right, then Ibrahim was wholly to blame for the accident, for there was a white line at the mouth of the junction indicating that he should have waited there to give way to the deceased who was on the main road and therefore had priority.

But Mr. Marjoribanks submits that the first plaintiff cannot be right, because of the following undisputed facts. There were brake marks of the off-side wheels of the lorry at the scene six feet and five inches long, indicated by D1 to E1. These brake marks are a considerable distance from the point of impact indicated by the first plaintiff. There were broken glass on the road at *Z* on the plan very near the brake marks. A slipper was found at *S*, 9 feet and 6 inches from D1, the beginning of the brake marks, and another at *U* off the road altogether about 12 feet from the road edge. After the accident the scooter was lying at *P* and *Q*, on its wrong side of the road. The lorry was hit by the scooter not on its off-side but on its near side, as can be seen from one of the photographs. From all these facts I am asked to infer that the collision occurred not opposite the mouth of the junction but somewhere near the brake marks and that when it occurred the lorry was on its correct side of the road and the scooter on its wrong side.

After the accident Ibrahim the lorry driver made a report in Malay to the Mentakab Police, which report is in the two agreed bundles. This is what he said in the English translation:

"At about 3.15 p.m. on 25th June, 1967, I left the town of Mentakab intending to go to Kuala Lumpur. I was then driving motor lorry BL6847. When I came out from the town I took the railway station road, Mentakab. When I arrived at the three-road junction railway gate Mentakab I stopped my lorry No. BL6847 and when I look towards the left and the right, I found nothing, and then I drove on. When I had travelled half the road, suddenly a Lambretta came from Karak Road proceeding toward Mentakab town. Straightaway it collided with the front of (my) lorry on the left."

Be it noted that the lorry driver made this report only thirty minutes after the accident. It is submitted on behalf of the plaintiffs that the words underlined suggest that the collision occurred when the lorry had travelled half way into the main road, while Mr. Marjoribanks submits that they suggest the lorry had emerged well out into the main road and was proceeding half way towards the railway crossing when the collision occurred.

I find that the truth lies somewhere between the first plaintiff's version and Mr. Marjoribanks' version. I find that the collision occurred not when the lorry was half way into the main road but shortly after that and between the spot indicated by the first plaintiff and a spot before the beginning of the brake marks, and thus threw the scooter to the place where it was found by the police. Probably the lorry driver did not keep a proper look out, and not seeing the scooter emerge from round the bend at the railway crossing, he emerged into the main road and shortly after that hit the scooter, and then veered more towards his side of the road and applied his brakes. The broken glass found near the brake marks probably came from the lorry's lamp.

I therefore find the lorry driver to blame for the accident.

The next question is: was the deceased scooterist partly to blame for this accident? Mr. Marjoribanks, citing *Lang* v. *London Transport Executive*,[1] *Fruitnight* v. *George Wallis Ltd.*[2] and *Shenley* v. *G. L. Newman Ltd.*,[3] submits that the deceased was half to blame. My finding is that the lorry driver was 2/3 and the deceased 1/3 to blame for this accident.

I shall now proceed to consider quantum.

The first plaintiff was 27 years of age at the time of the accident and apart from contusions, lacerations and abrasions he had two main injuries, namely, a fracture of the left clavicle (collar bone) and of the left femur (thigh bone). He was unconscious and did not recover his senses until three or four days after the accident. In August 1968 he was examined by the State surgeon who reported that the first fracture had healed satisfactorily and there was no limitation of movement, but that the second fracture had not united in too good a position and this had led to a shortening of about 1¾" which made squatting difficult. The

first plaintiff was a bookseller, which he still is, who also sells papers and magazines, some of which have to be delivered. At the time of the accident he was earning about $300 a month. He says in evidence that as a result of the accident because he has difficulty in squatting he has to employ an assistant in his bookshop whom he pays about $120 per month but he did not produce this assistant or books to prove this, and I therefore discount what he says.

Mr. Tay for the first plaintiff submits that his client should get general damages as follows:

(1) $2,500 for the fracture of the clavicle;
(2) $16,000 for the fracture of the femur resulting in pain and suffering and a shortening of the leg by 1¼" and loss of amenities, but exclusive of loss of future earnings; and
(3) about $20,000 for loss of earnings.

Mr. Marjoribanks concedes that —

(1) $2,500 would be fair damages for the fracture of the clavicle, but contends that —
(2) only a figure between $3,000 and $8,500 would be fair for the fracture of the femur, relying on cases noted in paragraphs 3803, 3823 and 3825 in *Mallal's* Digest; and
(3) the first plaintiff should get nothing for loss of earnings because the first plaintiff has not in his statement of claim mentioned the necessity for hiring of servants under special damages and has not claimed loss of earnings and that in any event he has not proved the same.

I have examined all the cases cited and award the first plaintiff —

(1) $2,500 for the fracture of the clavicle;
(2) $10,000 for the fracture of the femur resulting in pain and suffering, shortening of the leg and loss of amenities.

As regards loss of earnings, I do not consider that the first plaintiff has proved the same and I therefore award nothing under this head.

I also award the first plaintiff $300 agreed special damages.

The above figures are based on the assumption that the lorry driver was wholly to blame for the accident. But as I find that he was only 2/3 to blame, I order in Civil Suit No. 26 of 1968 the first defendant to pay the first plaintiff the above sums in full, with interest on general damages at the rate of 6% from the date of issue of writ until judgment and on special damages at the rate of 3% from the date of the accident until judgment, and I also order the first defendant to pay costs to the first plaintiff, and finally I order that the first defendant shall be entitled to a contribution by the third party (the second plaintiff) to the extent of 1/3.

As to the deceased, I find that he was a tailor earning about $200 a month. He was 27 years old and a bachelor. He lived at home with his parents and four other brothers and sisters. He gave his parents $100 a month, out of which they fed him on Sundays and public holidays, as on working days he was fed by his towkay in the shop. His mother died in 1968 and Mr. Onn, counsel for the second plaintiff, said that he made no claim in respect of her. Mr. Onn submits on the authority of the case noted in paragraph 3567 of *Mallal's* Digest that the multiplier here should be more than 11, as a tailor's occupation is not dangerous and his expectation of life should be 28 years and that his father might have been supported by his son for seven years, *i.e.*, until the age of 65 and that the value of the dependency should be determined at $50 per month and that in view of all this the second plaintiff should be awarded $4,200 general damages. Mr. Marjoribanks on the other hand submits that the multiplier should be not seven, but five and that on the authority of the case noted in paragraph 3645 of *Mallal's* Digest the second plaintiff merits only $3,000 and no more. Having given this matter the best consideration, I award the second plaintiff $3,500 general damages and $1,000 agreed special damages. As I find that the deceased was 1/3 to blame for the accident, in Civil Suit No. 37 of 1968 I order the defendants to pay the second plaintiff 2/3 of each of these figures with interest on the first sum at 6% from date of issue of writ until judgment and on the second sum at 3% from the date of the accident until the date of judgment. The defendants will also pay the second plaintiff's costs.

Judgments for the first and second plaintiffs respectively.

Solicitors: *Murphy & Dunbar; Lovelace & Hastings; Kam Woon Wah & Co.*

NASIB SINGH v. JAMILAH

[F.C. (Ong C.J. (Malaya), Gill and Ali F.JJ.) March 23, 1972]

[Kuala Lumpur — Federal Court Civil Appeal No. 112 of 1971]

Moneylenders — Accounts — Statement of — Onus to discredit — Intrinsic evidence of false entries — Disregard of date of payment of interests — Moneylenders Ordinance, 1951, s. 18.

Evidence — Inspection of moneylender's account by a debtor — Third party's account — Admissibility of — Corroboration purposes — Evidence Ordinance, 1950, ss. 11, 15 and 16.

This was an appeal against the decision of the High Court, setting aside the judgment of the sessions court, in a claim for a moneylending transaction.

On August 4, 1965, the respondent gave the appellant, a moneylender, her promissory note for $1,500, bearing interest at 18% *per annum*. The appellant's claim was for the total sum of principal and interest due, less the sum of $697.50 repaid intermittently on 21 occasions towards interest.

The respondent's defence, *inter alia*, was that she was in fact given a sum of only $500 against delivery of her promissory note. She was charged interest at 10 *per cent* per month and had been paying $50 each month regularly from September 1965 till December 1967, after which she had made further monthly payments of $20 to $30 each time, amounting to $600 till December 1969. However, the appellant's accounts contradicted what the respondent said.

The moneylender appealed to the Federal Court on the sole ground that, in applying section 18 of the Moneylenders Ordinance, 1951, to the loan account of the borrower in this case, the learned judge erred in his interpretation of the said section since the trial court had found as a fact that the account in question was in order.

Held, dismissing the appeal: (1) the onus of discrediting the statement of account rests on the borrower. To succeed,